

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ZACHARIAH DANIEL-JOSEPH CRAWFORD,

Defendant-Appellee.

UNPUBLISHED

December 15, 2009

No. 287482

Saginaw Circuit Court

LC No. 08-030594-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of assault with intent to rob while armed, MCL 750.89, conspiracy, MCL 750.157a, and felonious assault, MCL 750.82. We affirm.

The instant case involved alleged assaults on then 82-year-old James Erwin as he walked home. According to Erwin, defendant and his co-defendant Samantha Goff, both armed, approached Erwin three times as he walked home, demanded his money, and forcefully attempted to take it, albeit unsuccessfully. Defendant maintained that he and Goff approached Erwin only once, to ask Erwin to give defendant the money Erwin had promised to pay defendant's mother, Amy Spiller. Defendant denied attacking Erwin, and claimed that Erwin attacked him.

Defendant first argues that the trial court erred in not sua sponte reading CJI2d 7.5 given defendant's "claim of right" theory that he was entitled to collect money from Erwin for Spiller. Defendant failed to preserve this issue for appeal because he did not specifically request this instruction. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We review this issue for plain error affecting defendant's substantial rights and will not reverse unless defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant also argues that defense counsel rendered ineffective assistance by failing to request the jury instruction regarding defendant's "claim of right" defense. Because no *Ginther*¹

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

"The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific intent crime, there must be evidence that the defendant intended to rob or steal." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Consequently, if a defendant acts under a claim of right to the property taken, the element of intent to rob or steal is lacking. *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993).² A claim of right defense is viable when the defendant had a good faith belief that he or she had a legal right to take the property at issue. *People v Cain*, 238 Mich App. 95, 118-119; 605 NW2d 28 (1999). The defense applies even if the defendant's belief is mistaken or unreasonable. *Id.* "It is necessary, however, in all cases that the claim of right be a bona fide one and not a mere cover for a felonious taking. The taker's claim of right must be something more than a vague impression, it must amount to an honest conviction." *People v Karasek*, 63 Mich App 706, 713; 234 NW2d 761 (1975), quoting 52A CJS, Larceny, § 26, pp 449-450.

The trial evidence did not support defendant's claim of right theory. Defendant did not testify that he was trying to recover his own money from Erwin. Nor can defendant show that he was asserting a legal right to take the money, because if Spiller had a legal right to money promised by Erwin, there was no evidence she transferred that right to defendant in exchange for consideration. To the contrary, by defendant's admission, he simply volunteered to try to obtain the money from Erwin when Spiller asked Goff to get it. Accordingly, we find that the trial court did not err by not sua sponte reading CJI2d 7.5.

Even if we were to find that a "claim of right" defense was viable here, defendant cannot show that the jury instructions were insufficient. CJI2d 7.5, regarding a "claim of right" defense, provides in pertinent part:

(1) To be guilty of [_____], a person must intend to steal. In this case, there has been some evidence that the defendant took the property because [he] claimed the right to do so. If so, the defendant did not intend to steal.

(2) When does such a claimed right exist? It exists if the defendant took the property honestly believing that it was legally [his] or that [he] had a legal right to have it. Two things are important: the defendant's belief must be honest, and [he] must claim a legal right to the property.

(3) You should notice that the test is whether the defendant honestly believed [he/she] had such a right. It does not matter if the defendant was mistaken or should have known otherwise. [It also does not matter if the defendant (used

² A claim of right defense would not apply to defendant's felonious assault charge, as a taking is not an element of this offense. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.82.

force/trespassed) to get the property or if (he/she) knew that someone else claimed the property.]

The trial court did not err by failing to give this instruction. “Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). The trial court instructed the jury that, in order to convict defendant, it must find that he had the intent to rob Erwin at the time he committed the assault. The trial court also instructed the jury that, in order to find that defendant was guilty of robbery, it had to find that defendant intended to take money belonging to someone else. Examined as a whole, the instructions sufficiently covered the substance of CJI2d 7.5 and the trial court’s failure to sua sponte read CJI2d 7.5 did not affect defendant’s substantial rights.

Defendant also cannot show that he was denied the effective assistance of counsel. “Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* Defense counsel did not render ineffective assistance by failing to request an instruction that was not supported by the evidence. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). However, even if the “claim of right” defense was viable and defense counsel’s failure to request CJI2d 7.5 fell below an objective standard of reasonableness, defendant did not show that the outcome of the trial likely would have been different but for the failure because, as we concluded above, the jury instructions as a whole covered the substance of the instruction.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder